

**STATE OF MICHIGAN
IN THE SUPREME COURT**

Appeal from the Michigan Court of Appeals
Judges: Cooper, P.J. and Markey and Meter, JJ.

People of the State of Michigan,

Plaintiff-Appellant,

v

Gevon Ramon Davis,

Defendant-Appellee.

Supreme Court No. 125436

Court of Appeals Number 242207

Circuit Court No. 02-009635-FH

Brief on Appeal – Appellee

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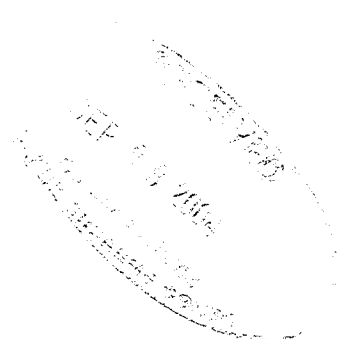


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STATEMENT OF JURISDICTION

Appellant request the Court to review the Court of Appeals opinion entered in *People v Davis*, CA 242207 (Nov. 25, 2003) pursuant to MCR 7.302. Leave to appeal was granted in an order entered June 3, 2004.

STATEMENT OF ISSUES INVOLVED

The Court should affirm the trial court because Defendant-Appellee's subsequent prosecution violated his right against being placed twice in jeopardy under the Michigan Constitution.

The Court answers "NO."

Plaintiff-Appellee answers "NO."

Defendant-Appellant answers "YES."

STATEMENT OF FACTS

Defendant-Appellee's motion to quash the information was argued on June 11, 2002, before the honorable James T. Corden, substituting for the Honorable Robert M. Ransom. Defendant-Appellee argued that the case law supported his position that because he was convicted in the State of Kentucky of Theft by Unlawful Taking Disposition of an Automobile over \$300.00 and sentenced on this felony precluded the State of Michigan from charging him with Unlawful Driving Away an Automobile and Receiving and Concealing Stolen Property over \$1,000.00 but under \$20,000.00 in the same transaction. (M.T. p. 3-10) The prosecutor at that time argued case law supports a successive prosecution, and that he should be able to prosecute Defendant-Appellee for the same conduct that he was previously convicted of and sentenced for. (M.T. p. 10-16) The trial court granted Defendant-Appellee's motion to quash. (M.T. p. 18) The prosecutor appealed to the Court of Appeals. The Court of Appeals in a decision dated November 25, 2003, affirmed the trial court. The prosecutor sought leave before the Court. In an order dated June 3, 2004, the Court granted the prosecutor's application.

ARGUMENT I

The Court should affirm the trial court because Defendant-Appellee's subsequent prosecution violated his right against being placed twice in jeopardy under the Michigan Constitution.

Standard of Review

Constitutional questions are reviewed de novo. The Court should place itself in the position of the framers of the constitution and determine what was meant at the time of adoption, and every reasonable presumption must be made in favor of constitutionality unless unconstitutionality is clearly apparent. *People v Swint*, 225 Mich App 353 (1997)

The prosecutor invited the Court to follow the doctrine of dual sovereignty and deny Defendant-Appellee the previous protection awarded to him by the Michigan Constitution, Const. 1963, art. 1, sec. 15 as upheld by the Court in *People v Cooper*, 398 Mich 450 (1976). In *Cooper* the Court held:

"We feel the interests of the state and the defendant are best accommodated by the approach of the Pennsylvania Supreme Court in *Commonwealth v Mills*, 447 Pa 163; 286 A2d 638 (1971). We perceive that approach as requiring and we so held that Const 1963, art 1, § 15 prohibits a second prosecution for an offense arising out of the same criminal act unless it appears from the record that the interests of the State of Michigan and

the jurisdiction which initially prosecuted are substantially different. Analysis on a case-by-case basis cannot be avoided.”
People v Cooper, supra at 460-461

By so ruling the Court recognized that the notion of dual sovereignty applies when each sovereign has an interest in protection different social interests. The Court declined to accept the defendant’s proposal that *all* successive prosecution by two sovereigns be prohibited. To determine whether the interests of the sovereign are substantially different, courts should examine such factors as whether “prosecutions arising out of the same criminal act, may include whether the maximum penalties of the statutes involved are greatly disparate, whether some reason exists why one jurisdiction cannot be entrusted to vindicate fully another jurisdiction’s interests in securing a conviction, and whether the differences in the statute are merely jurisdictional or are more substantive.” 393 Mich at 461

In *People v Gay*, 407 Mich 681, 693-694 (1980) the Court stated in *Cooper*, “we found that emerging Federal trends in recent years and the dictates of our own Constitution required us to impose limits on what dual sovereignty would permit....This Court recognized the fundamental need to safeguard defendant’s constitutional rights. We therefore prohibited dual prosecution where the interests of the state are not ‘substantially different.’”

The Court in *Gay* further stated:

“*Cooper* represents a strong and uncompromising statement by this Court that a defendant’s right not to be twice tried in Federal and state court for the same criminal act will be

jealously guarded except in extreme cases where Federal laws are framed to protect substantially different social interests.... *Cooper* makes clear that as a firm rule dual prosecution ordinarily will not be tolerated in Michigan....Further since this safeguard of defendant's right against double jeopardy is of a constitutional magnitude, it must receive this Court's consideration. 453 Mich at 694-695.

In the *People v Mezy*, 453 Mich 269 (1996), in the lead opinion three Justices of the Court voted to overrule *People v Cooper, supra*. Justice Levin in his dissent stated:

"There is no evidence in *Cooper* that this Court did not understand the consequences of its decision or that it acted on a whim. The opinion was reasoned and careful. Although the opinion did not use the words 'compelling reason,' the Court found significant, compelling merit in the criticisms of the dual sovereignty doctrine and the failure of that doctrine to protect the rights of the accused. The Court balanced the state's interests in prosecuting those who had broken the law and the defendant's right to avoid multiple prosecutions..." 453 Mich at 299.

* * *

"The concerns addressed by this Court in *Cooper* and *Gay*, as well as those stated in judicial opinions in other states and scholarly writings remain. The right against being put twice in

jeopardy is a personal right that would be impinged by successive federal and state prosecutions. This right must give way when the prosecutions serve significantly different ends. But unless the subsequent state prosecution is shown to meet the test set forth in *Cooper*, the individuals right to protection from further governmental prosecution should prevail. Nothing has occurred factually or jurisprudentially to change the fundamental impolicy of successive prosecutions. Until it can be shown otherwise, we should continue to follow *Cooper*.” 453 Mich at 304.

In *People v Childers*, 459 Mich 216 (1998), the Court declined an invitation by the prosecution to overrule *People v Cooper, supra*. Instead the Court applied the test in *Cooper* as to whether the interests of the two sovereigns are substantially different. The defendant had entered a guilty plea in court-martial proceedings to rape, sodomy, and indecent liberty for which he received a sentence of confinement for 24 months. He was then charged in state court with first-degree criminal sexual conduct and entered a plea to third-degree criminal sexual conduct. The Court determined “the social interests of the state of Michigan were not satisfied by the military court martial of the defendant.” The Court reversed the Court of Appeals and reinstated defendant’s convictions.

In *People v Hermiz*, 462 Mich 71 (2000) the Court addressed whether the state was barred from prosecuting the defendants for conspiracy to possess with intent to deliver more than 650 grams of cocaine after they were previously convicted of conspiracy to possess with intent to distribute more than five kilograms of cocaine in federal court. The Court did not use

a *Cooper* analysis but discussed whether the state prosecution was barred by MCL 333.7409; MSA 14.15 Justice Cavanagh stated as follows:

“The dual sovereignty doctrine provides that the same underlying transaction can give rise to separate state and federal prosecutions without violating the Federal Double Jeopardy Clause. *Bartkus v Illinois*, 359 US 121; 79 Sct 676; 3 L Ed2d 684 (1954), and *Abate v United States*, 359 US 187; 79 Sct 666; 3 L Ed2d 729 (1959). This Court expressly rejected the dual sovereignty doctrine in *People v Cooper*, 398 Mich 450, 461 (1976). When the present case was first appealed to this Court, a minority of justices voted to overrule *Cooper* and adopt the dual sovereignty doctrine. Although, *Cooper* survived today’s case brings *Cooper* one step closer to becoming a ‘hollow shell.’ *People v Childers*, 459 Mich 216, 277 (1998)...In the throws of *Mezy’s Cooper* discussion, the constitutional double jeopardy challenges brought by the defendants were arguably cast aside so that the case could be statutorily resolved. *People v Mezy*, 453 Mich 269, 280, 286 (1996). Today, the lead opinion would carve out yet another exception to the rule that dual prosecutions are not permitted for the same transaction.”

The Court should not overrule *Cooper*. The prosecutor in this case originally argued that *Cooper* had been overruled by *Mezy*. Now he has shifted his position and is asking the Court to overrule *Cooper*. *This is contrary to the principle of stare decisis*. As the Court stated in *Parker v Port Huron Hosp*, 361 Mich 1, 10 (1960):

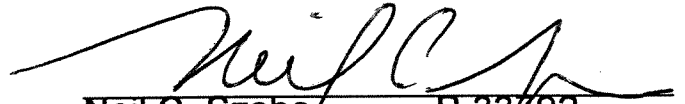
“The rule of stare decisis establishes uniformity, certainty, and stability in the law, but it was never intended to perpetuate error or to prevent the consideration of rule of law be applied to the ever-changing business, economic, and political life of a community. Only in the rare case when it is clearly apparent that an error has been made or changing conditions resulted in injustice by the application of an outmoded rule, should be deviate from following the established rule.”

This is not the rare case that requires *Cooper* be overruled. The Court has applied a *Cooper* analysis where appropriate in all the above cases and should continue to do so in this case. Under that analysis Defendant-Appellee’s dismissal on double jeopardy grounds should be affirmed. The prosecutor concedes this and does not suggest another result under a *Cooper* analysis. Instead he urges the Court to overrule *Cooper*. His argument must fail.

PRAYER FOR RELIEF

WHEREFORE, Defendant-Appellee respectfully requests tht the Court of Appeals and trial court be affirmed.

Respectfully submitted,


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Dated: 9-2-04

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